No. 82-213

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In The

Supreme Court of the United States

OCTOBER TERM, 1982

CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 633 of NEW HAMPSHIRE, et al.,

Petitioners,

versus

JONES MOTOR CO., INC.

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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QUESTIONS PRESENTED[1]

1. Whether a Court of Appeals which reverses a District Court's decision that it is not the appropriate forum for a dispute may order summary judgment for the appellant where the merits of the dispute were not addressed by both parties in the Court of Appeals.

2. Whether procedural due process prohibits an appellate court from ordering summary judgment for an appellant without providing the appellee the opportunity to address the merits of the dispute.

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1 In addition to the Local Union, Antonio Chloros and Leo Kelly were parties below individually and in their official capacities as Secretary-Treasurer and Business Representative, respectively. They are also Petitioners herein.

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In The

Supreme Court of the United States

October Term, 1982

Chauffeurs, Teamsters and Helpers,
Local Union No. 633 of New Hampshire, et al.,

Petitioners,

vs.

Jones Motor Co., Inc.

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

Petitioners, Chauffeurs, Teamsters and Helpers, Local Union No. 633 of New Hampshire, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Antonio Chloros and Leo Keily, petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit, entered on April 8, 1982, which reversed and remanded a decision of the United States District Court for the District of New Hampshire.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 671 F.2d 38. It is reproduced *infra*, Appendix ("App.") B.

The initial opinion of the United States District Court for the District of New Hampshire, dated February 19, 1981, is unreported and is reproduced *infra*, App. D. The opinion denying Plaintiff's Motion for Reconsideration, dated April 20, 1981, is unreported and is reproduced *infra*, App. C.

JURISDICTION

The initial judgment of the Court of Appeals was entered on February 19, 1982 (App. B1). The Court of Appeals denied Local 633's petition for rehearing on April 1, 1982 (App. A1) and issued its Mandate on April 8, 1982. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

Section 301(a) of the Labor Management Relations Act of 1947 (61 Stat. 156, 29 U.S.C. §185(a)) provides, in pertinent part:

> §185. Suits by and against labor organizations
>
> (a) Venue, amount, and citizenship. Suits for violation of contract between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

A. Facts

On December 18, 1979 Roger Pellerin was scheduled to work on the loading platform of the Company's Nashua,

New Hampshire freight terminal. Pellerin's shift began at 6:00 p.m. and ended at 2:30 a.m. with a half-hour lunch break from 11:30 p.m. to 12 midnight. Another employee, Filteau, was scheduled to work the same shift and two other employees worked a shift which began at 11:00 p.m.

That night was the third successive night of sub-zero weather. The loading area where Pellerin and Filteau worked was open to the sub-zero weather and had a temperature equivalent to the outside. Joseph Lacourse, supervisor/dispatcher for the Company, allowed Pellerin and Filteau to enter a heated coffee area (something they were normally not allowed to do) to warm-up on five or six occasions during the course of the evening because he knew how cold they were and because they said they were cold.

At approximately 8:30 p.m., Filteau came into the office and told Lacourse that he was "sick," and would try to "stick it out" as long as he could, but wanted Lacourse's permission to go home early. At approximately 10:00 p.m. Filteau asked for, and Lacourse granted him, permission to go home (A. 76-77). Lacourse then wrote in his log that, "Filteau went home sick at 2200."

Pellerin kept on working the loading dock by himself. From time to time he came into the office to try to warm-up; he made no further complaint about the cold, but Lacourse noted they did not have to complain about the cold, "it was obvious." Pellerin did not stop for lunch at 11:30 but instead continued working with the two newly arrived employees for another fifteen minutes.

At 11:45 p.m. Pellerin entered the office and informed Lacourse that he was frozen, that the cold was going right through him, that he was going home because he could not take it anymore and that he would not be back for the balance of the shift. Pellerin took Lacourse's basic silence as consent and punched out for the evening. Subsequently Lacourse entered in his log book that "Pellerin went home at 2345 frozen," and did not write "quit."

When Pellerin arrived for work the next day, his time card had been removed from the rack and he was not permitted to work. Lacourse told him that, in the Company's opinion, he had quit the night before.

Local 633 took the position that Pellerin had not quit, but had gone home sick, and that the Company had "discharged" him without first discussing the disciplinary action with Business Agent Leo Kelly as required by Article 46, Section 5 of the contract between the Company and the Union.[2]

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2 The Company and Local 633 are parties to the National Master Freight Agreement and the Northern New England Supplemental Agreement. Article 46, Section 5 states, in pertinent part:

> (a) Scope of Procedure
>
> Prior to the taking of any other than emergency action as contained in Sections (b) and (c) below, including resort to any court or administrative agency or tribunal, by either Employer or the Local Union, all grievances or disputes shall be taken up and considered by the Employer and the Union Business Agent who shall make every attempt to settle same.
>
> (b) No Disciplinary Action
>
> The Employer shall take no disciplinary action other than emergency action against an employee, or group of employees, until after Section 5(a) above has been complied with in good faith. Upon the Employer and the Business Agent having exhausted all amicable discussions in attempting to settle the grievance or dispute, in whole or in part, then either party may take the unresolved question to arbitration as herein provided.
>
> . . .
>
> (d) Must Submit
>
> Failure of Employer to comply nonarbitrable. Telegraphic request. All disputed complaints, or grievances, and any and all claims, demands, or actions growing therefrom, or involved therein, which are covered by terms of this contract, or which pertain to labor relations between the contracting parties, regardless of whether or not they are covered by the terms of this contract, and which the Employer has

(Continued)

Pursuant to its interpretation of Article 46, Local 633 threatened to strike if the Company did not reinstate Pellerin and then arbitrate the propriety of discipline. The Company maintained that Pellerin had quit, but indicated that it would submit to arbitration without reinstating Pellerin.

On December 27, 1979, Local 633 struck and established a picket line at the Company's terminal. On January 3, 1980, the Company filed the instant action seeking an injunction and damages. The strike ended the next day. Nevertheless, the Company continued to litigate its demand for damages.

At the same time that it ended the strike, the Local submitted a grievance on behalf of Pellerin to the contract arbitrators, the Northern New England Joint Area Committee. The arbitrators deadlocked. Pursuant to Article 46(1)(b) of the Supplemental Agreement, the grievance was then submitted to another arbitrator, the Eastern Conference Joint Area Committee. That body decided that Pellerin should be reinstated with full seniority on June 2, 1980, but that the preceding six months should be considered as a suspension for which no compensation, health and welfare, or pension contributions would be made. The Committee also decided to issue a final warning letter to Pellerin for walking off the job.

(2 Continued)

> tried and been unable to settle with the Business Agent as per Section 5 (a) of this Article shall be submitted to the Joint Area Committee by the complaining party. Failure on the part of an Employer to comply with Section 5 of this Article shall be a violation of this Agreement and shall not be arbitrable by the Joint Area Committee, nor shall the provisions of Section 1 of this Article apply provided, however, that a written telegraph request by the Union to the home office of the Employer involved is made.

Article 46, Section 1, mentioned in Section 5(d), is the no strike clause.

B. The District Court Decision

Local 633 and the Company filed motions for summary judgment on the merits of the dispute: whether the strike had breached the no-strike clause in the contract. *Sua sponte*, however, the District Court held that it was "an inappropriate forum for the resolution" of the dispute and referred to the parties to arbitration on the issue of breach of contract and damages (App. D11). In denying the Company's motion for reconsideration, the Court rejected arguments that the contract did not **require** the arbitration of such issues and that Local 633 had waived any right to insist upon arbitration instead of litigation (App. C4, 7-8).

C. The Court of Appeals Decision

The Court of Appeals held that regardless of whether the contract had required the arbitration of the Company's claim, Local 633 had waived its right to demand arbitration by defending the damage action on its merits without ever raising the issue of arbitrability (App. B7-12). Rather than remanding to the District Court for a determination of the merits of the disupte, the Court of Appeals decided the issue of liability (App. B12). It concluded that the issue of Pellerin's reinstatement was presumptively arbitrable and that Local 633 could not unilaterally determine that the no-strike and arbitration clauses did not apply (App. B14-15). Accordingly, the Court reversed and remanded to the District Court with instructions to enter summary judgment in favor of the Company and to determine the amount of damages.

REASONS FOR GRANTING THE WRIT

I. The Procedure Below Conflicts with Procedures Followed in the Third and Fifth Circuits and is Contrary to Decisions of this Court

In *United States v. Ballard*, 322 U.S. 78, 88 (1944), the Court remanded rather than decide issues not adequately presented to the Court. The Court reasoned that

> the remaining questions were not fully presented to this Court either in the briefs or oral argument. In view of these circumstances, we deem it appropriate to remand the cause to the Circuit Court of Appeals so that it may pass on the questions reserved. . . . If any questions of importance survive and are presented here, we will then have the benefit of views of the Circuit Court of Appeals.

See also: Brown v. Fletcher, 237 U.S. 583, 588 (1915).[3] In *Mackey v. Mendoza-Martinez*, 362 U.S. 384, 385-386 (1960), the Court requested supplemental briefs in response to questions raised, *sua sponte*, by the Court.

This petition asks the Court to determine whether a court of appeals has a similar obligation to remand or to request supplemental briefs where "questions were not fully presented [to the court of appeals] in the briefs or oral argument."

This question falls within the penumbra of two prior decisions of the Court. In *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957), the Court held that "[a] successful party in the District Court may sustain its judgment on any ground that finds support in the record." However, in *Fountain v. Filson*, 336 U.S. 681, 683 (1949), the Court held that, on reversal of a summary judgment, an appellate court could order summary judgment for the appellant only after affording the appellee a fair opportunity to "dispute the facts material" to the new theory of decision. Here, the District Dourt denied cross-motions for summary judgment and dismissed the complaint for lack of jurisdiction. The Court of Appeals found jurisdiction but entered summary

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3 In *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 234 (1938), the Court held that procedural due process "assumes that appellate review does afford opportunity to present all available defenses. . . ."

judgment for the Company without entertaining a full discussion of the merits of the case, thereby depriving Local 633 of a fair opportunity to present its case on the merits of the dispute.

The First Circuit's treatment of the case contrasts sharply with the practice in the Third and Fifth Circuits. Those courts request supplemental briefs to address issues raised by the court. *Local 334, United Association v. United Association*, 628 F.2d 812, 813 (3d Cir. 1980), *rev'd on other grounds*, 452 U.S. 615 (1981); *Cox v. Operating Engineers*, 672 F.2d 421, 422 (5th Cir. 1982); *Bishop v. NLRB*, 502 F.2d 1024, 1025 (5th Cir. 1974). In contrast, the First Circuit, presented with a jurisdictional question on appeal determined the merits of the case despite only a cursory presentation by the parties.[4] The First Circuit failed to "proceed cautiously" while reaching an issue not addressed by the District Court. *United States v. General Motors*, 518 F.2d 420, 441 (D.C. Cir. 1975).

The Court of Appeals reached the merits of the case, rather than remanding, because "both sides submitted this case to the district court for summary decision and [because] the case raises a single issue of contract interpretation." (App. B12). However, the absence of multiple issues for interpretation does not dispense with the need for analysis by the parties on the "single issue" presented. Furthermore, it is well-settled that

> [t]he filing of cross-motions for summary judgment does not necessarily concede the absence of a material issue of fact. This must be so because by the filing of a motion a party concedes that no issue of fact exists under

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4 The Company devoted but two pages in 37 pages of briefs to its argument that the District Court should have granted its motion for summary judgment. Local 633 did not address the issue. Oral argument was devoted to the question of arbitrability squarely presented by the parties.

> the theory he is advancing, but he does not thereby so concede that no issues remain in the event his adversary's theory is adopted.

Nafco Oil and Gas, Inc. v. Appleman, 380 F.2d 323, 324-325 (10th Cir. 1967). *See also: United States v. Article of Device...*, 527 F.2d 1008, 1011 (6th Cir. 1976); *Cram v. Sun Ins. Office, Ltd.*, 375 F.2d 670, 673-674 (4th Cir. 1967); *American Fidelity & Cas. Co. v. London & Edenburgh Ins. Co.*, 354 F.2d 214, 216 (4th Cir. 1965).

The Court of Appeal's treatment of this case deprived Local 633 of the opportunity to argue several significant points. Local 633 had argued to the District Court that the Company had discharged Pellerin without first arbitrating the propriety of discipline as required by Article 46, Section 5(b) of the contract. The Company had argued that Section 5(b) was inapplicable because Pellerin had quit and was not disciplined. If Pellerin had been discharged prior to arbitration, Section 5(d) states that the Company's violation of Section 5(b) is not arbitrable **and** that the no strike clause is inapplicable. Thus, if Pellerin was discharged, the strike was lawful. Both the District Court (App. D9) and the Court of Appeals (App. B14) explicitly refused to decide the "discharge-quit" issue. Instead, the Court of Appeals held that the issue was presumptivley arbitrable and that Local 633 should have arbitrated (App. B14).

The First Circuit's analysis ignores the post-strike decision of the Eastern Conference Joint Area Committee, contrary to the holdings of the Fourth, Seventh and Eighth Circuits. According to the First Circuit, the explicit arbitrable issue was whether Pellerin quit or was discharged, and, implicitly, whether the no-strike clause applied. By ordering Pellerin's reinstatement without backpay and with a final warning, the Committee necessarily considered Pellerin to

have been discharged.[5] The Fourth, Seventh and Eighth Circuits have held that post-strike arbitration awards may be conclusive proof either that there was no breach or that there were no compensible damages. *Valmac Industries, Inc. v. Meat Cutters Local 425*, 519 F.2d 263, 269 (8th Cir. 1975) *vacated on other grounds*, 428 U.S. 906; *Associated Contractors v. Local 563, Laborers*, 519 F.2d 269, 271 (8th Cir. 1975); *Western Publishing Co. v. Graphic Arts Union*, 522 F.2d 530, 533 (7th Cir. 1975), *cert. denied*, 423 U.S. 1088; *Cedar Coal Co. v. Mine Workers*, 560 F.2d 1153, 1172-1173 (4th Cir. 1977), *cert. denied*, 434 U.S. 1047; *Pilot Freight Carriers, Inc. v. Teamsters*, 659 F.2d 1252, 1258-1259 (4th Cir. 1981). Thus, while it would have been safer to arbitrate instead of striking, Local 633 gambled on its interpretation of the facts and the Committee sustained Local 633's position, at least in part. It is axiomatic in labor relations that a party may unilaterally act upon its interpretation of the contract and that a subsequent arbitration award either awards damages from the outset or validates the action *nunc pro tunc*. This axiom applies both in discipline cases and in strike damage actions. In other words, if the Company had discharged Pellerin, the subsequent strike was lawful; but if Pellerin had quit and the Company had merely refused to rehire him, the subsequent strike was unlawful. The court of appeals should not have based its finding that the strike was unlawful on the mere fact that the quit-discharge issue itself was arbitrable while ignoring the subsequent arbitration which had resolved that issue.

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5 As the party opposing the motion for summary judgment, Local 633 is entitled to all favorable inferences drawn from undisputed facts. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-159 (1970); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Of course, if the Company disputes this interpretation by raising a factual issue, the entry of summary judgment was erroneous.

CONCLUSION

For the reasons stated herein, we respectfully urge the Court to grant a Writ of Certiorari in this case.

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